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No.

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In the Supreme Court of the United States

October Term, 1984

JAMES H. LYONS,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTION PRESENTED FOR REVIEW

Does the Double Jeopardy Clause of the federal Constitution prohibit re-trial of an indictment where the first jury was discharged without returning a verdict less than three hours after it had informed the trial court that it had reached agreement on one of the two counts, had been given a modified "Allen" charge as to the whole case and had not been asked in any way if there was a possibility of reaching a verdict?

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To the Supreme Court of Ohio

To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINIONS OF THE COURT BELOW

The Supreme Court of Ohio dismissed the appeal from the Ohio Court of Appeals, Eleventh Appellate District, as not involving a substantial constitutional question. App. A1.

The judgment and opinion of the Ohio Court of Appeals, Eleventh Appellate District, affirming the Lake County Court of Common Pleas is attached. App. A3-A8.

The Lake County Court of Common Pleas denied petitioner's post-trial motion for dismissal on double jeopardy grounds. App. A10.

No opinion in this case has been officially reported.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio dismissing the appeal on constitutional grounds was entered January 16, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVED

The relevant constitutional and statutory provisions involved herein are set forth in Appendix at A11-A13.

Fifth Amendment

Fourteenth Amendment

Ohio Rules of Criminal Procedure, No. 31

Federal Rules of Criminal Procedure, No. 31

STATEMENT OF THE CASE

James Lyons was tried before a jury in Lake County Common Pleas Court on an indictment charging him with two counts of involuntary manslaughter of the same person. In the first count it was alleged that he caused the death of the victim as the proximate result of committing the offense of felony abduction. In the second count he was charged with proximately causing the death of the same person as the result of misdemeanor menacing. The person allegedly abducted or menaced was not the person who was killed.

The jury began deliberating on late Thursday afternoon[1] and was recessed after about an hour's delibera-

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1. The trial began on Monday morning.

tion. The judge ordered the jury to return the next day, Friday, at 8:30 a.m. The jurors continued throughout Friday until late afternoon, when inquiry was made as to the status of their deliberations.

At about that time the jury communicated to the bailiff that it had reached a verdict on the first count, but could not agree on the second. The bailiff reported that fact to the court.

After being informed that there was a verdict on one count, the court did not instruct the jury to return the verdict that it had agreed upon, but instead gave a modified *Allen* charge, urging the jury to decide the "case." After another hour or so of deliberations, the jury was recessed for the weekend.

The jury deliberated again from 9:00 a.m. Monday until about 11:45 a.m. At that time it sent word to the court that it was unable to agree on either count.

Upon the jury being brought back into the courtroom, the court announced that it had been informed that the jury could not agree on either count and asked the foreman, only, if that was true. Receiving an affirmative answer, the court, without asking any other juror or without asking if there was a possibility of reaching a verdict, dismissed the jury.

The appellant filed a post-trial motion for various forms of relief, including dismissal on jeopardy grounds. The motion was denied without opinion. The appellant then sought reconsideration of the ruling on double jeopardy grounds. The trial court denied petitioner's motions.

The petitioner then filed a notice of appeal to the Ohio Court of Appeals, Eleventh Appellate District,

which, after briefing and argument, affirmed the trial court.

The petitioner then appealed to the Ohio Supreme Court which dismissed the appeal as one not involving any substantial constitutional question.[2]

ARGUMENT

This case involves the protection of the Double Jeopardy Clause relating to the defendant's "valued right to have his case decided by the first jury impaneled." *Wade v. Hunter*, 336 U.S. 684.

Long settled law has established that nothing in the Constitution prohibits a second trial if the first jury has been discharged without returning a verdict if there is "manifest necessity" for the discharge of that jury. *United States v. Perez*, 9 Wheat 579.

Likewise, it has been long established that one "manifest necessity" is a "genuinely deadlocked" jury, i.e., unable after whatever suitable time to agree on a decision. *Arizona v. Washington*, 434 U.S. 497.

The case presents important, and as yet, unresolved (at this level) questions regarding how any trial judge, state or federal, should decide if a jury is, in fact, genuinely deadlocked. Without doubt, at that very sensitive moment when a trial judge is deciding whether to declare a mistrial, he is faced with two competing interests: the

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2. After the first jury had been discharged and before the scheduled re-trial date, the petitioner filed a motion in the trial court urging dismissal on jeopardy grounds, *inter alia*.

The assignment of error in the Ohio Court of Appeals claimed that the trial judge had erred in dismissing the jury, there being no manifest necessity for the act.

defendant's right to have this jury decide his fate and the government's right to have "one full and fair opportunity to convict those who have violated its laws." *Arizona v. Washington, supra,* at 509.

I.

This Court recognized in *Arizona v. Washington, supra,* that normally the trial judge is in the best position to ascertain whether or not a jury is genuinely deadlocked. The Court also pointed out that appellate courts will ordinarily give great deference to such a discretionary determination, unless the record reveals that the judge failed to exercise the sound discretion entrusted to him. *Arizona v. Washington, supra,* at 510, fn. 28.

The question left open by *Arizona v. Washington, supra,* is what method, technique or information a trial judge should rely upon in exercising his discretion in a case in which the jury claims to be deadlocked. It is one thing to give appellate deference to a discretionary finding, but it is quite another to do so *post hoc* where neither the appellate court nor the trial court knew what initially guided the exercise of the discretion.

II.

In this case there can be no appellate deference to the decision of the trial court to abort the trial because the judge affirmatively ignored the jury's announcement on Friday afternoon that it had reached a verdict on count one of the indictment.

Whatever else the rules of exercising that discretion might be, they can never include specifically telling a jury *not* to return a verdict that it has reached. That is precisely what happened here.

On June 8, 1984, the trial court sent the bailiff to inquire of the jury if it was close to a verdict. This was approximately 4:00 p.m. (App. A9) At that time the bailiff was informed that the jury had reached an agreement on count one, but was "hung" on count two. That fact was reported to the court.

At 5:35 p.m., June 8, 1984, the trial court "instructed" the jury that it was its "duty to make every reasonable effort to decide this *case*. . ." (App. A9) (Emphasis added.) This was done without even passing reference to the fact that the court had been informed an hour or so before that the jury had reached a verdict on the first count.

There can be little doubt that this instruction was tantamount to telling the jury *not* to return its verdict on count one. There is likewise little doubt that this instruction showed far too little regard for the protection of the defendant's "valued right to have his fate decided by the first jury impaneled." *Wade v. Hunter, supra.* As the court noted in *Illinois v. Somerville*, 410 U.S. 458, 471, the determination to abort a criminal trial is a "weighty one" and it is so not just for administrative reasons. It is "weighty" because of the significant interests of the defendant that vested when his first jury was sworn in.

While Ohio Rule of Criminal Procedure 31 is identical to Federal Rule of Criminal Procedure 31, the failure of the judge to request that the original agreement on count one be formally returned is immaterial to the question here and is probably not of federal constitutional significance.

What is material and constitutionally significant is the failure of the trial court to take that extremely recent information (the agreement) into account when considering

whether, 2 3/4 hours later, the jury was "genuinely deadlocked." While a "genuinely deadlocked" jury provides ample "manifest necessity" for the termination of the trial free from double jeopardy restraints on another trial, a "deadlocked" jury that has shortly before announced to the court that it was *not* deadlocked and had, in fact, an agreement, simply does not rise to that level.

Under the tests explained in *Arizona v. Washington, supra,* it is clear that this record does not warrant appellate deference to the finding of the trial judge. Without that deference to the exercise of his discretion, the record cannot withstand scrutiny. When the trial judge gave a "dynamite" charge to a jury that had told him it had an agreement on one count and when he failed to make any specific inquiry of the jury whether there was a possibility of reaching an agreement, he failed to apply proper constitutional standards.

III.

The petitioner does not suggest that the Court establish any "litmus" test or check list for trial judges confronted with an apparently deadlocked jury. Clearly, criminal trials are far too complicated and varied for such treatment.

The petitioner does suggest that the importance of the right involved and the large numbers of "hung juries" nationwide[3] require significantly more guidance in the handling of this task than is presently available to trial courts. Indeed, it is plain that not even Justice Harlan's standard for a plurality in *United States v. Jorn,* 400 U.S.

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3. The petitioner is not presently able to know how many "hung" juries there are in 50 states, but it cannot be insubstantial.

470 (". . . until a *scrupulous* exercise of judicial discretion. . . .", *Id.* at 485), is enough.

Certainly there was not "scrupulous" exercising of judicial discretion in this case.

If the proper question is not the present inability of the jury to agree, but whether agreement is possible, then that ingredient in the constitutional test of "manifest necessity" must also be a constitutional requirement. Cf. *United States v. Horn*, 583 F.2d 1124; *United States v. Gordy*, 526 F.2d 613; *United States v. See*, 505 F.2d 845. It would seem that the trial judge in any such case must satisfy himself that agreement is not *possible* before declaring a mistrial free from constitutional prohibitions against re-trial.

In order to perform that function a trial judge must inquire of the jurors if agreement is possible and probably individually. The Tenth Circuit has suggested that inquiry is required:

> The question is whether the judge can reach a verdict without making inquiry, which objectively shows that such is the situation.

Horn, supra, at 1126.

The Ninth Circuit has also decided that mere conclusions are not sufficient and that judge had further responsibilities.

> Upon receiving a communication from the jury stating that it cannot agree, the trial court must question the jury to determine independently whether further deliberations might overcome the deadlock.

Arnold v. McCarthy, 566 F.2d 1377. The same circuit has also held that merely questioning the foreman may not

be sufficient to determine if a jury is genuinely deadlocked. *United States v. See, supra.*

Likewise, the Fifth Circuit has considered the question and has held in *United States v. Gordy, supra,* that lack of certainty that a verdict could not be reached fell short of manifest necessity.

At least the Fifth and Ninth Circuits have listed criteria to aid in the determination of whether a jury is deadlocked. The lists are not the same. Nor are any lists likely to be applicable to all such situations. What would appear to be applicable is an independent inquiry by the trial judge of all the jurors under circumstances encouraging candor to ascertain if agreement is *possible.*

Without that kind of minimal inquiry it will always be impossible to say if the tests of *United States v. Perez, supra,* and *Arizona v. Washington, supra,* are being properly and uniformly applied. They surely were not in this case.

CONCLUSION

This Court should grant the writ to decide the application of the constitutional tests to this petitioner.

Respectfully submitted,

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APPENDIX

ORDER OF SUPREME COURT OF OHIO DISMISSING THE APPEAL

(Dated January 16, 1985)

Case No. 84-1665

THE SUPREME COURT OF OHIO

STATE OF OHIO,
Appellee,

v.

JAMES H. LYONS,
Appellant.

APPEAL FROM THE COURT OF APPEALS
FOR LAKE COUNTY

This cause, here on appeal from the Court of Appeals for Lake County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

FRANK D. CELEBREZZE
Chief Justice

ORDER OF SUPREME COURT OF OHIO DENYING MOTION FOR LEAVE TO APPEAL

(Dated January 16, 1985)

Case No. 84-1665

THE SUPREME COURT OF OHIO

STATE OF OHIO,
Appellee,

v.

JAMES H. LYONS,
Appellant.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR LAKE COUNTY

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Alberto Purola.

FRANK D. CELEBREZZE
Chief Justice

JUDGMENT ENTRY OF THE OHIO COURT OF APPEALS FOR THE ELEVENTH APPELLATE DISTRICT

(Filed October 2, 1984)

Case No. 10-218

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

STATE OF OHIO)
) ss.
COUNTY OF LAKE)

STATE OF OHIO,
Plaintiff-Appellee,

vs.

JAMES H. LYONS,
Defendant-Appellant.

JUDGMENT ENTRY

For the reasons stated in the opinion of this court, the assignment of error is overruled, and it is the judgment and order of this court that the judgment of the trial court is affirmed.

/s/ ALFRED E. DAHLING
Judge

OPINION OF THE OHIO COURT OF APPEALS FOR THE ELEVENTH APPELLATE DISTRICT

(Filed October 2, 1984)

Case No. 10-218

COURT OF APPEALS
ELEVENTH DISTRICT
LAKE COUNTY

STATE OF OHIO,
Plaintiff-Appellee,

vs.

JAMES H. LYONS,
Defendant-Appellant.

OPINION

CHARACTER OF PROCEEDINGS: Criminal appeal from the Lake County Common Pleas Court Case No. 83 CR 685

JUDGMENT: *AFFIRMED*

DAHLING, *J.*,

This is an appeal from a judgment of the Court of Common Pleas, Lake County, in which the court denied defendant-appellant's motion for acquittal.

On December 16, 1983, defendant was indicted on two counts of involuntary manslaughter connected to the death of Harry Wyse. Count one of the indictment charged that the defendant, in an attempt or in the commission of a felony abduction, caused the death of Wyse.

Count two of the indictment charged that the defendant, in an attempt or in the commission of a misdemeanor menacing, caused the death of Wyse.

On June 2, 1984, the trial began. After presentation of evidence and testimony, the jury began its deliberations on June 5, 1984. The jury continued deliberations Friday at 8:30 a.m. and remained in deliberations until 4:00 p.m., at which time the court inquired as to the status of their deliberations. The court was informed by the bailiff that they had reached an agreement on the first count but had not reduced the agreement to writing. The court then issued a modified *Allen* charge and allowed the jury to continue their deliberations until 6:30 p.m. Still unable to reach an agreement, the jury was excused for the weekend.

The jury began deliberating anew on Monday morning at 8:30 a.m. and continued to do so until 11:45 a.m. At this point, the jury sent a message to the court to the effect that they could not reach an agreement on either count. Counsel for the defendant, the jury and counsel for the State were reassembled before the trial court judge, who inquired of the jury foreman whether or not they were unable to reach a verdict. The foreman replied that they could not reach a verdict. The record reflects that counsel for the defendant agreed with the court's assessment of the jury's status.

On June 11, 1984, the jury was dismissed. On June 29, 1984, the defendant filed a motion for judgment of acquittal. On August 6, 1984, the court overruled the motion of the defendant and set a re-trial date of August 20, 1984. Defendant filed a motion for reconsideration which was denied on August 16, 1984. On August 17, 1984, defendant filed a notice of appeal in this court.

The assignment of error is as follows:

> 1. The trial court erred in dismissing the jury in this case, there being no manifest necessity for the act and no inquiry made by the trial court regarding the possibility of reaching a verdict.

The assignment of error is without merit.

The court discharged the jury on June 11, 1984. The entry simply states:

> "June 11 - Jury deliberates a total of 13 1/2 hours. and is a mistrial. Jury excused."

The above was not appealed. The defendant filed a motion for acquittal which was denied on August 7, 1984. However, the clerk's time stamp indicates the entry was filed on August 6, 1984 at 3:08 p.m. How an entry could be filed one day before it was typed is "strange."

The defendant asked for reconsideration which was denied on August 16, 1984. The defendant has appealed the denial of his motion for reconsideration. However, the assignment of error is regarding the court's dismissing the jury and declaring a mistrial. So, the defendant is complaining about an order he did not appeal. This is also "strange." However, the prosecutor has indicated he does not wish to press this point.

A resolution of the assignment of error is by a careful scrutinizing of what occurred at the time of ordering a mistrial. The defendant contends the court had an absolute duty to inquire of the jury if there was a "possibility" of their reaching a verdict. In support of this, defendant has cited certain United States and Ohio decisions. However, an analysis of these cited cases indicates that it is a "case by case" determination.

In the within case, the jury deliberated for about ten hours without returning a verdict. The court then gave a modified "Allen" charge. The jury deliberated further—for several more hours—and reported they were deadlocked. The judge inquired of counsel if they agreed the jury was hung. Defense counsel stated: "Attaching no particular significance to this, I concur."

Defense counsel cannot be faulted for "concurring" that the jury was hung because that was a fact—they were hung.

Based on these events, we conclude that the court did not err in ordering a mistrial. The court could have pressed the jury further as to their ability to reach a verdict or inquired as to the status of their deliberations. However, as appellee argues, this would have been a delicate situation which would have sent certain signals to the jury.

In *Smith v. Commonwealth*, 321 S.W. 2d 786 (Ky. Ct. App. 1959), the Court cautions against the possible dangers of a trial judge improperly influencing an apparently deadlocked jury by what he says to them. The court states that:

> "It behooves a trial judge to be most careful in what he says to a jury when it appears that body may be hung and he seeks to have them reach a verdict. . . A presiding judge should never inquire, or let the jury inform him, how it stands when it is apparently hung." *Id.*, at 789.

Similarly, in *State v. Middletown*, 63 S.E. 2d 163 (S.C. 1951), the court found that a trial judge had committed prejudicial error in inquiring about the jury's standing. Again wary of the possibility of the trial judge improperly influencing the jury, the court found that "it is improper

[for the trial judge] to make the jury publicly reveal their standing in regard to the conviction or acquittal of the accused." *Id.* at 165.

The defendant has discovered that at one point the jury voted unanimously for acquittal on count I and were split 7 to 5 on count II. However, they subsequently became hung on count I as well as count II. The tentative verdict on count I was never reported and was not reduced to writing. For this reason, it is of no significance.

We conclude that the trial court acted within its discretion in finding that the jury was deadlocked and in then declaring a mistrial. The United States Supreme Court stated in *Gori v. United States*, 367 U.S. 364 (1961):

> "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." *Id.*, at 368.

The judgment is affirmed.

/s/ ALFRED E. DAHLING
Judge

COOK, *P.J.*,
FORD, *J.*, concur

PAGE 2 OF TRANSCRIPT OF JUNE 8, 1984, LAKE COUNTY COMMON PLEAS COURT

[2] The Court: Counsel, neither of you have any objection to Ms. Skok concerning as court reporter?

Mr. Hawkins: No, Your Honor.

Mr. Morrison: No.

The Court: Ladies and gentlemen of the jury, first, a word of caution. After you have commenced your deliberations, it is important that the Court choose its words carefully, and that you refrain from any remarks that may affect the rights of either party or which may disclose your opinion as a member of the jury.

This is a new and difficult assignment for you. The process of discussion and deliberation in the jury room is necessarily slow and requires consideration and patience. The secrecy which surrounds your efforts prevents others, including the court, from knowing when your efforts will results in a verdict.

It is your duty to make every reasonable effort to decide this case if you can * * *

PAGE 2 OF TRANSCRIPT OF AUGUST 16, 1984, LAKE COUNTY COMMON PLEAS COURT

[2] BE IT REMEMBERED, that heretofore, to-wit: On Thursday, the 16th day of August, 1984, being one of the regular days of said Court, before the Honorable James W. Jackson, the following proceedings were had:

The Court: This is the State of Ohio v. James Lyons, Case No. 83CR 685. Present is Albert Purola, attorney for the Defendant with Stewart Savage. Mr. Judd Hawkins is present, attorney for the State, assistant prosecutor for Lake County.

On August 7, 1984, this Court denied Defendant's motion for acquittal and scheduled this case for trial for August 20, 1984, at 9:00 a.m., this Monday.

Subsequent to that defense counsel has requested a hearing before this Court to supplement his record of the briefs and trial record for his filing a notice of appeal as to the Court's ruling as previously stated.

Mr. Purola has requested the Court to ask the bailiff, the Court's bailiff, Mr. John Clair, to state on the record his recollection of what transpired * * *

PAGE 6 OF TRANSCRIPT OF AUGUST 16, 1984, LAKE COUNTY COMMON PLEAS COURT

[6] Mr. Purola: Your Honor, in the motion that I filed earlier for judgment of acquittal, pursuant to Rule 29, the first portion of that motion dealt with the argument about the double jeopardy clause prohibiting a re-trial in this case.

I renew that motion at this time on the grounds that the Jury was improperly discharged.

The question I would like to ask Mr. Clair is: Whether or not you ever became aware at any time what the verdict was—the agreement was, not verdict—what the agreement was with regard to count one?

Mr. Clair: In my opinion, when we talked that night, Mr. Purola and I, that it would be only logical it was not guilty. But I don't believe I was aware of the verdict at that time.

The Court: To your knowledge, your recollection whether it was guilty or not guilty?

Mr. Clair: No. I spoke to Mr. Purcla that evening.

THE CONSTITUTION OF THE UNITED STATES

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . .

Amendment XIV; Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO RULES OF CRIMINAL PROCEDURE

Rule 31. Verdict

(A) Return. The verdict shall be unanimous. It shall be in writing, signed by all jurors concurring therein, and returned by the jury to the judge in open court.

(B) Several defendants. If there are two or more defendants the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed. If the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(C) Conviction of lesser offense. The defendant may be found not guilty of the offense charged but guilty of an attempt to commit it if such an attempt is an offense at law. When the indictment, information, or complaint charges an offense including degrees, or if lesser offenses are included within the offense charged, the defendant may be found not guilty of the degree charged but guilty of an inferior degree thereof, or of a lesser included offense.

(D) Poll of jury. When a verdict is returned and before it is accepted the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberation or may be discharged.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 31. Verdict

(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

(b) Several defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(c) Conviction of less offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

(d) Poll of jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

(e) Criminal forfeiture. If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.